

No. 15356

United States
Court of Appeals
for the Ninth Circuit

ROYAL E. JORGENSEN and MARY M. JORGENSEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States.

FILED

JAN 18 1957

PAUL P. O'BRIEN, CLERK



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Petition to Review a Decision of the Tax Court
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APPEARANCES

GEORGE G. HOLDEN, ESQ.,
Courthouse,
Austin, Nevada,
For Petitioners.

CHARLES K. RICE,
Assistant U. S. Attorney General,
LEE A. JACKSON,
Attorney, Department of Justice,
Department of Justice,
Washington 25, D. C.,
For Respondent.

The Tax Court of the United States

Docket No. 60789

ROYAL E. JORGENSEN and MARY M. JORGENSEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1956

- Jan. 23—Petition received and filed. Taxpayer notified. Fee paid.
- Jan. 24—Copy of petition served on General Counsel.
- Feb. 27—Entry of appearance of George G. Holden as counsel filed.
- Mar. 19—Motion to dismiss for lack of jurisdiction filed by respondent.
- Mar. 22—Hearing set on respondent's motion for April 25, 1956, Washington, D. C.
- Apr. 25—Petitioner's written argument to respondent's motion to dismiss filed.
- Apr. 25—Hearing had before Judge Murdock on motion of respondent to dismiss. Granted.
- Apr. 26—Ordered, that respondent's motion to dismiss is granted and proceeding is dismissed for lack of jurisdiction.
- July 26—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

1956

July 26—Proof of service filed.

Aug. 7—Designation of record on review filed by petitioner.

Aug. 7—Proof of service of designation of contents of record on review filed.

Aug. 30—Order extending time for filing record on review and docketing petition for review to October 24, 1956, entered. Served 8/31/56.

Sept. 5—Transcript of Hearing April 25, 1956, filed.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, DDIR:A:90-D:LEB:min, dated October 20, 1955, a copy of which is attached hereto and by reference made a part hereof, and as a basis of his proceedings alleges as follows:

1. The above-named petitioners are husband and wife, individuals, and are the taxpayers against whom the said deficiency was determined, and whose residence is the International Hotel, Austin, Nevada. The return for the period here involved was filed with the Collector for the Reno district of Nevada.

2. The notice of deficiency was mailed to the petitioners on October 20, 1955.

3. The taxes in controversy are income taxes for the calendar year 1952, and are in the amount of \$2,917.14, plus penalties \$439.68.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner erred in not using the facts as set forth in petitioners' return.

b. The Commissioner erred in disallowing deductions for operation, maintenance and depreciation of petitioners' trucks.

c. The Commissioner erred in disallowing petitioners' deductions for cost of labor.

d. The Commissioner erred by making an arbitrary determination of the petitioners' taxes based on petitioners' gross bank deposits.

e. The Commissioner erred in determining a deficiency against the petitioners.

f. The Commissioner erred in that his determination of the deficiency is without basis in evidentiary facts.

g. The Commissioner erred in that his determination tends to deprive the petitioners of property without due process of law.

5. The facts upon which the petitioners rely as the basis for this proceeding are as follows:

a. The petitioners kept their books and made their return for the year 1952 on a cash basis.

b. The petitioners were in the trucking business in the taxable year 1952, and also both worked for wages.

c. The petitioners reported their gross receipts in their trucking business, from which they subtracted costs of operation of the trucks used in the said business, the cost of maintenance and the depreciation of said trucks.

d. The petitioners also subtracted the cost of labor for the operation of said trucks, and the withholding statements for such labor were duly and properly filed. There were no other deductions claimed and the results of subtracting the foregoing deductions from the gross receipts were entered as the net profit of the business. The said net profit was added to the gross wages and the sum of which was used as the taxable income. All of which is pursuant to, and within the confines of, the Internal Revenue Code.

e. The Commissioner rejected the petitioners' return as set forth above, and merely added the petitioners' gross bank deposits together, and called that the adjusted gross income. The Commissioner then allowed the standard deduction of \$1,000.00 and determined petitioners' taxes on the balance, all of which is contrary to the Internal Revenue Code and the Constitution of the United States.

f. The gross bank deposits have little, if any, bearing on the net profit of a business, and would therefore not be considered as evidentiary in determining a taxpayer's income where other good and competent evidence is available. The petitioners filed a return in which they set forth the necessary evidentiary facts for making a determination of the petitioners' taxable income, and to use any other

bases for a determination of said income is arbitrary and tends to deprive the taxpayer of property without due process of law.

Wherefore, the petitioners pray that this Court may hear the proceeding and determine that there is no deficiency due by petitioners for the year 1952, and that no penalties should be assessed.

/s/ GEORGE G. HOLDEN,
Counsel for Petitioners.

(Copy)

U. S. Treasury Department
Internal Revenue Service
P. O. Box 891, Reno, Nevada

Form 1230 (Nov. 1953)

(Seal)

Office of
District Director of Internal Revenue

Oct. 20, 1955.

Mr. Royal E. Jorgensen and
Mrs. Mary M. Jorgensen
Husband and Wife
Austin, Nevada

Dear Mr. and Mrs. Jorgensen:

You are advised that the determination of your income tax liability for the taxable year ended

December 31, 1952, discloses a deficiency of \$2,917.14 plus penalties of \$439.68 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Audit Division, P. O. Box 891, Reno, Nevada.

The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after the receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earliest.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,

By V. W. EVANS,
District Director of
Internal Revenue.

Enclosures:

Statement

Form 1276

Agreement Form

Duly verified.

Received and filed January 23, 1956, T.C.U.S.

Served January 24, 1956.

[Title of Tax Court and Cause.]

MOTION TO DISMISS

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and

Moves to dismiss the above-entitled proceeding for lack of jurisdiction and for cause avers:

That the notice of deficiency herein was mailed on October 20, 1955;

That the envelope containing the petition herein was postmarked Ely, Nevada, January 20, 1956, a Friday;

That January 20, 1956, falls on the 92nd day after October 20, 1955; and

That pursuant to sections 6213 and 7502 of the Internal Revenue Code of 1954, the petition herein was not timely filed.

Wherefore, it is prayed that this motion be granted.

/s/ JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service.

Filed March 19, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

MINUTES OF PROCEEDINGS
APRIL 25, 1956

On motion of respondent to dismiss.

Ordered: Granted.

Exhibits: Respondent's

A. Photostat copy of mailing list.

/s/ RALPH A. STARNES,
Deputy Clerk.

[Title of Tax Court and Cause.]

PROCEEDINGS

Wednesday, April 25, 1956

The proceedings in the above-entitled matter came on for hearing, pursuant to notice, at 11:15 o'clock a.m.

Before: Honorable J. Edgar Murdock.

Appearances:

THOMAS E. TYRE, ESQ.,
On Behalf of the Respondent.

The Clerk: Docket No. 60789, Royal E. Jorgensen and Mary M. Jorgensen.

Mr. Tyre: If your Honor please, this case is before the court on Respondent's motion to dismiss for lack of jurisdiction on the ground that the petition was not timely filed. The deficiency notice was mailed to the taxpayer on October 20, 1955. The petition was mailed to the Tax Court on January 20, 1956, which was ninety-two days after the mailing of the statutory notice. In support of his motion, Respondent offers a photostat of the mailing list showing that the deficiency notice was mailed on October 20, 1955.

The Court: It may be filed, and the motion is granted.

(Whereupon, at 11:17 o'clock a.m., the proceedings in the foregoing matter were concluded.)

Filed September 5, 1956, T.C.U.S.

The Tax Court of the United States

Docket No. 60789

ROYAL E. JORGENSEN and MARY M. JORGENSEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF DISMISSAL

This case came on for hearing April 25, 1956, at Washington, D. C., upon respondent's motion to dismiss for lack of jurisdiction, alleging that the petition was not filed within the time prescribed by statute. Counsel for respondent argued the motion. Petitioner filed on April 25, 1956, a response to the motion. It appears from the record that the petition was not filed within the time prescribed by statute. The premises considered, it is

Ordered: That respondent's motion to dismiss is granted and the proceeding is dismissed for lack of jurisdiction.

/s/ J. E. MURDOCK,
Judge.

R.S.

Served: April 30, 1956.

Entered: April 30, 1956.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Come Now the Petitioners above named, by their attorney, George G. Holden, Esq., and petition the above-entitled Court as follows:

I.

That Petitioners are residents of the State of Nevada.

II.

That said State of Nevada is located within the Ninth Circuit.

III.

That the above-entitled case shall be reviewed in the United States Court of Appeals for the Ninth Circuit.

IV.

That the case at bar arose as a result of the assessment of a deficiency by the Commissioner against the Petitioners and taxpayers.

V.

That on the 26th day of April, 1956, the Tax Court of the United States entered its order dismissing said case for lack of jurisdiction.

VI.

That it is the last above-mentioned order for which review is sought.

Wherefore, Petitioners pray that:

1. That a review by the United States Court of Appeals for the Ninth Circuit shall be allowed.

2. That all files and records in the said case necessary to be transmitted to said Court shall be so transmitted as provided by law.

Dated this 23rd day of July, 1956.

/s/ GEORGE G. HOLDEN,
Attorney of Record for
Petitioners.

Received and filed July 26, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on review and docketing the petition for review in the United States Court of Appeals for the Ninth Circuit is extended to October 24, 1956.

Dated: Washington, D. C., August 30, 1956.

[Seal] /s/ J. E. MURDOCK, R.S.
Judge.

Served Aug. 31, 1956.

Entered Aug. 31, 1956.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 11, inclusive, constitute and are all of the original papers and proceedings as called for by the "Designation of Record on Review," on file in my office as the original and complete record in the proceeding before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court proceeding have initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of October, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15356. United States Court of Appeals for the Ninth Circuit. Royal E. Jorgensen and Mary M. Jorgensen, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed October 24, 1956.

Docketed November 8, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Docket No. 15356

ROYAL E. JORGENSEN and MARY M. JOR-
GENSEN,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' POINTS TO BE
URGED ON REVIEW

Come Now the appellants above named, by their attorney of record, George G. Holden, Esq., and submit the following Points in support of their Petition for Review in the above-entitled matter.

1. That Commissioner's Motion to Dismiss was not filed within forty-five (45) days from the time he was served with the Petition filed herein.

2. That the Petition herein was filed before the Commissioner had made a legal move to recover on his deficiency notice.

3. That to dismiss the Petition filed herein would be to deny the Appellants due process of law, both remedial and substantive as provided by the United States Constitution.

4. That to dismiss the Petition without a hearing on its merits would be to arbitrarily force the

Appellants to pay a tax amount which they do not owe under the law.

5. That to dismiss the Petition herein is to give the Commissioner the legislative power to levy and collect a tax on income different and separate from that tax on income authorized by Congress, and since Congress has no power to delegate its legislative authority, it is unconstitutional for the Commissioner either to assume such authority or for the Court, by its act, to award him such authority.

6. That Section 6213 (a) and (c) of the United States Code 1954, which the Commissioner has cited, provides a time limit within which the Commissioner may not recover on his deficiency. There is no statement in the said Sections which may be construed to mean that the Court has no jurisdiction to hear a case not brought before it within ninety days.

7. That notwithstanding the fact that the Petition is entitled "Petitioners vs. The Commissioner," the Appellants are defendants in every legal sense of the word, and under the Constitution of the United States are entitled to all the rights and privileges of defendants in any other Court or any other kind of case.

/s/ GEORGE G. HOLDEN,
Attorney of Record.

[Endorsed]: Filed November 27, 1956, U.S.C.A.
